UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)

IN RE DRY MAX PAMPERS LITIGATION	)	No. 1:10-cv-00301-TSB
	)	
	)	The Honorable Timothy S. Black
	)	

PLAINTIFFS' STATEMENT REGARDING DEFENDANTS' MOTION TO STRIKE CLASS ALLEGATIONS, PLAINTIFFS' MOTION FOR APPROVAL OF NOTICE AND NOTICE PLAN, AND PLAINTIFFS' MOTION FOR STAY

For the following reasons, Plaintiffs inform the Court that they will no longer pursue this case as a class action. Plaintiffs maintain that Dry Max Pampers were marketed as safe but in fact caused harm to their children. Scientific investigation and government action, however, lead Plaintiffs to conclude that this case is best pursued on an individual basis, rather than as a class action. Given the procedural posture of the case, Sixth Circuit law encourages, and possibly requires, that notice be made to the purported class members that the class claims will no longer be pursued. Plaintiffs thus move the Court for approval of a proposed notice and notice plan. *See* Declaration of Gretchen Freeman Cappio, filed concurrently herewith, at Exhibit 1 (proposed notice) ("Cappio Decl."). Plaintiffs further move the Court to stay the case until 30 days after notice is published, at which time Plaintiffs request that the Court strike the class allegations and allow Plaintiffs to amend their Consolidated Class Action Complaint (Dkt. 25).

I. PROCEDURAL BACKGROUND

Plaintiffs filed their initial suits in May, June, and July 2010. At that time, Plaintiffs sought to represent a class of

> All persons in the United States who purchased or acquired (including by gift) Pampers brand diapers or "Easy Ups" containing "Dry Max" technology ("Dry Max Pampers"), and who discarded or ceased using the Dry Max Pampers because of concerns about health effects including, but not limited to: severe rashes, blisters, welts, bleeding, oozing, chemical burns, infections, sores, scarring and/or other ailments linked to the Dry Max Pampers.

Dkt. 25 (Consolidated Class Action Complaint) at 105. This definition excludes consumers who were satisfied with the diapers. Plaintiffs also sought to represent similar classes for several individual states. *Id*. at 105-109.

As the Court knows, the parties reached a tentative settlement in 2011, which the Court approved. Dkt. 73. An objector appealed the Court's approval order, the Sixth Circuit reversed, and the case was remanded back to the Court. Dkt. 80.

Prior to reaching the tentative settlement, Procter and Gamble had filed a Motion to Dismiss and a Motion to Strike Class Allegations. Dkt. 39 (Motion to Strike Class Allegations) and Dkt. 40 (Motion to Dismiss). The Court stayed consideration of the motions while the parties attempted to settle the matter. Dkt. 50 (granting request to stay deadlines while parties mediated dispute). These motions are pending.

II. PLAINTIFFS HAVE CONCLUDED THAT THIS MATTER IS BETTER PURSUED AS AN INDIVIDUAL ACTION

Plaintiffs' ongoing evaluation of the case leads to the conclusion that this matter is better pursued as a consolidated action on behalf of individual plaintiffs. *See, e.g.*, Sharon E. Jacobs, M.D., et al., *Allergic Contact Dermatitis to Pampers Drymax*, Pediatric Dermatology 1-2 (2012) Cappio Decl. Ex. 2 (regarding physicians' investigation of Dry Max Pampers showing individualized reactions to Dry Max Pampers).

III. SIXTH CIRCUIT LAW FAVORS NOTICE PRIOR TO DISMISSING THE CLASS ALLEGATIONS

Federal Rule of Civil Procedure 23(e) provides that notice is required if a "certified class" settles or dismisses its claims. In *Doe v. Lexington-Fayette County Government*, 407 F.3d 755, 764 (6th Cir. 2005), the Sixth Circuit adopted "the view of the majority of the circuits that Rule 23(e) applies in a precertification context where putative class members are likely to be prejudiced." *See also Eastham v. Chesapeake Appalachia*, LLC, 2:12-CV-615, 2013 WL 3818549 (S.D. Ohio July 23, 2013) (examining sufficiency of notice in a dismissal of claims on behalf of a non-certified class).

The *Doe* test requires that the Court examine whether "putative class members are likely to be prejudiced on account of settlement or dismissal" and, if so, "the district court should provide Rule 23(e) notice." 407 F.3d at 762. Publicity is "one factor among others that a district court should take into account when considering whether putative class members are likely to be prejudiced by a settlement." *Id*. at 763.

This case has had significant publicity. Dkt. 68 at 45, n. 54 (detailing more than 200 media outlets that covered the parties' settlement). Plaintiffs therefore believe that notice to the class that the class claims will not be pursued is prudent, even if not required.

Plaintiffs believe that notice should be provided in the same or substantially similar manner to how notice of the proposed settlement was publicized, which included posting on Plaintiffs' counsels' website, on the Pampers website, and on the Pampers Facebook page. Dkt. 54 at 17-18 (detailing notice plan for settlement).

Exhibit 1 is the proposed notice. The notice clearly explains that the case will not be pursued as a class action and that individuals who are not already part of this action must take

action if they wish to pursue their claims against Procter & Gamble for the consumer claims that are the focus of this action.

IV. CONCLUSION

While Plaintiffs oppose much of the substance of the Motion to Strike Class Allegations, they do not oppose the relief sought in as much as it would remove the class allegations from the Consolidated Class Action Complaint. Thus, Plaintiffs request that the Court approve the attached proposed notice and order that notice be disseminated in a manner the same as, or substantially similar to, how notice of the proposed settlement was distributed. Plaintiffs also request that the Court stay the case until 30 days following the publication of notice, at which time Plaintiffs request that the Court order the class allegations stricken, and allow Plaintiffs to amend their Consolidated Complaint accordingly.

DATED this 15th day of November, 2013.

KELLER ROHRBACK L.L.P.

/s/ Gretchen Freeman Cappio

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 15, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties so registered.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: November 15, 2013

/s/ Gretchen Freeman Cappio
Gretchen Freeman Cappio